

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
RANDY R. HERSCHAFT, ASSOCIATED	)	FOIA Control Nos. 2003-524, 2003-525, and
PRESS	)	2003-526
	)	
On Requests for Inspection of Records	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 16, 2007**

**Released: March 21, 2007**

By the Commission:

1. The Commission has before it three applications for review, filed by Randy Herschaft, Associated Press, of the denials by the Enforcement Bureau (EB or Bureau) of three Freedom of Information Act (FOIA) requests. For the reasons stated below, we deny the applications for review.

**I. BACKGROUND**

2. Herschaft's three FOIA requests all concern the Continuing Property Record (CPR) audits of the Regional Bell Operating Companies (RBOCs) conducted in the late 1990s.<sup>1</sup> The former Accounting Safeguards Division (ASD) of the former Common Carrier Bureau (CCB or the Bureau)<sup>2</sup> conducted audits of the RBOCs' hard-wired central office equipment to determine whether the carriers' records were in compliance with Part 32 of the Commission's rules.<sup>3</sup> The Bureau denied each of Herschaft's FOIA requests because they seek internal Commission records protected by FOIA Exemption 5 and confidential commercial records protected by FOIA Exemption 4.<sup>4</sup>

**A. The FOIA Requests**

3. In *FOIA 2003-524*, Herschaft sought copies of "any and all briefing materials used by Commission staff to brief the Hill on the Continuing Property Record (CPR) Audits of the then seven regional bell operating companies (Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Bell, Southwestern Bell and US West Telephone Companies), conducted by the Accounting Safeguards Division of the Common Carrier Bureau in the late 1990s."<sup>5</sup> The Bureau sought, and the RBOCs

<sup>1</sup> See generally *Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit*, 15 FCC Rcd 1784 (1999) (*Continuing Property Records Audit*), petition for review denied in part and remanded sub nom., *Qwest Communications Int'l, Inc. v. FCC*, 229 F.3d 1172 (D.C. Cir. 2000) (*Qwest Communications*).

<sup>2</sup> CCB is now the Wireline Competition Bureau (WCB).

<sup>3</sup> See 47 C.F.R. Part 32.

<sup>4</sup> Three letters from Maureen F. Del Duca, Chief, Investigations and Hearing Division, Enforcement Bureau to Randy Herschaft, Associated Press (Oct. 7, 2003) (denying FOIA Control Nos. 2003-524, 2003-525, and 2003-526 (*Decision 2003-524 Decision 2003-525 and Decision 2003-526* respectively)).

<sup>5</sup> Letter from Randy Herschaft, Associated Press to Shoko Hair, FOIA Officer (Aug. 13, 2003) (*FOIA 2003-524*).

provided, responses to this FOIA.<sup>6</sup> In *Decision FOIA 2003-524*, the Bureau determined that the requested materials are exempt from disclosure under Exemption 5 of the FOIA, which protects from compulsory disclosure “inter-agency or intra-agency memorand[a] or letters which would not be available by law to a party other than an agency in litigation with the agency.”<sup>7</sup> In addition, the Bureau found that four pages contained material containing confidential financial information that is exempt from disclosure under Exemption 4 of the FOIA, which protects from compulsory disclosure “trade secrets and commercial or financial information obtained from a person [that are] privileged or confidential.”<sup>8</sup>

4. In *FOIA 2003-525*, Herschaft sought copies of “workpapers/notebooks produced in the [CPR] Audits of seven regional Bell operating companies...conducted by the Accounting Safeguards Division of the Common Carrier Bureau in the late 1990s.”<sup>9</sup> The request sought materials containing information submitted in conjunction with a Commission audit conducted pursuant to section 220 of the Communications Act, as amended (the Act).<sup>10</sup> Section 220(f) of the Act prohibits Commission staff from “divulg[ing] any fact or information which may come into [the staff’s] knowledge during the course of an examination of books or other accounts . . . except insofar as he may be directed by the Commission or by a court.”<sup>11</sup> In *Decision 2003-525*, the Bureau determined that the materials sought in *FOIA 2003-525* were exempt from disclosure under Exemptions 4 and 5 of the FOIA, and that disclosure of the materials was not in the public interest. The Bureau analyzed the confidentiality of the commercial and financial information submitted in the course of the audit using the general test applicable to Exemption 4 of the FOIA as set forth in *National Parks and Conservation Ass’n v. Morton*.<sup>12</sup> Applying the second prong of the *National Parks* test, the Bureau concluded that the information sought in the FOIA Request constitutes commercially sensitive data, the disclosure of which would likely cause “substantial harm to the competitive position” of the RBOCs.<sup>13</sup> The Bureau found that Herschaft had failed to demonstrate the significant public interest necessary to overcome the general prohibition against disclosure of section 220

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<sup>6</sup> Letter from Steven L. Earnest, Esq., BellSouth Corp., to William Knowles-Kellett, EB (Sept. 19, 2003); letter from Daphne E. Butler, Esq., Qwest, to William Knowles-Kellett (Sept. 19, 2003); letter from Terri L. Hoskins, Esq., SBC Telecommunications, Inc. to William Knowles-Kellett (Sept. 22, 2003); and letter from Marie Breslin, Esq., Verizon, to William Knowles-Kellett (Sept. 23, 2003).

<sup>7</sup> 5 U.S.C. § 552(b)(5); *see also* 47 C.F.R. § 0.457(e) (Commission implementing rule).

<sup>8</sup> 5 U.S.C. § 552(b)(4); *see also* 47 C.F.R. § 0.457(d) (Commission implementing rule).

<sup>9</sup> Letter from Randy Herschaft to Shoko Hair (Aug. 13, 2003) (*FOIA 2003-525*).

<sup>10</sup> 47 U.S.C. § 220. Pursuant to section 220(c), carriers are required to provide the Commission access to “all accounts, records, and memoranda, including all documents, papers and correspondence...” 47 U.S.C. § 220(c).

<sup>11</sup> 47 U.S.C. § 220(f). Commission rules delegate authority to the Enforcement Bureau to disclose information subject to section 220(f) in response to a FOIA request. 47 C.F.R. § 0.311(a)(6).

<sup>12</sup> 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). *National Parks* established a two-prong test for determining whether information was “confidential” for purposes of Exemption 4: “[c]ommercial or financial matter is ‘confidential’...if disclosure of the information is likely . . . either . . . (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Id.* at 770. The court subsequently held that the *National Parks* test applied to situations where a party must submit information to a federal agency on a mandatory basis. *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 878-79 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993). Submissions made pursuant to section 220(c) are mandatory. *See Continuing Property Records Audit*, 15 FCC Rcd at 1793 n.44 (1999), *remanded on other grounds sub nom. Qwest Communications*, *supra*.

<sup>13</sup> *Decision 2003-525* at 3.

audit materials.<sup>14</sup> The Bureau further concluded that the FOIA request covered audit work papers generated by the staff while conducting the audit and that these materials, whether or not they contained confidential Exemption 4 information, were exempt from disclosure pursuant to Exemption 5 of the FOIA.<sup>15</sup> The Bureau further concluded that “no meaningful non-exempt information could be segregated from the documents.”<sup>16</sup>

5. In the third request, *FOIA 2003-536*, Herschaft sought “(1) correspondence/communications between then-Commissioners Powell, Tristani, Ness, Furchtgott-Roth, and Chairman Kennard or their aides and the auditors who oversaw the [CPR] Audits of seven regional bell operating companies” and (2) “correspondence/communications to and from the management of the Common Carrier Bureau and to and from the Accounting Safeguards Division management relating to the [CPR] Audits.”<sup>17</sup> The Bureau concluded that all materials requested in *FOIA 2003-526* are deliberative process materials, reflecting preliminary and advisory views of Commission personnel involved in the audits, disclosure of which could compromise the Commission’s internal deliberative process.<sup>18</sup> The Bureau therefore found that all of the materials requested are exempted from disclosure under Exemption 5 of the FOIA, and the Bureau found that disclosure of the materials is not in the public interest.<sup>19</sup>

#### **B. The Applications for Review**

6. Herschaft filed applications for review of each of the Bureau’s FOIA decisions.<sup>20</sup> Herschaft implies that the Bureau did not make the showing necessary to withhold responsive documents from disclosure pursuant to FOIA Exemption 5. In this regard, Herschaft says the burden is on the agency under Exemption 5 to prove that any withheld records are predecisional and deliberative, but he never directly asserts that the Commission failed to make these showings. With respect to documents withheld pursuant to FOIA Exemption 4, Herschaft claims that the RBOCs’ arguments that the documents would expose trade secrets or competitive information are erroneous because “a large part of what we seek to explore is the work of the FCC auditors and how commission staff dealt with the CPR audits’ findings.”<sup>21</sup> In each application for review, Herschaft argues that disclosure of the requested material is in the public interest because “the audits consumed substantial government resources” and because disclosure was necessary to an assessment of whether the audit findings were appropriately addressed.<sup>22</sup> Herschaft maintains further that the posting on the FCC’s website of the audit reports was not sufficient to assess the validity of RBOC criticisms of the auditors’ methods or alleged discrepancies

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<sup>14</sup> *Decision 2003-525* at 4. The Bureau relied in part on *Qwest Communications*, 229 F.3d at 1183-84, in which the United States Court of Appeals for the District of Columbia Circuit overturned the FCC’s decision to release the raw data collected in the CPR audits pursuant to a protective order, holding that, while section 220(f) authorizes its disclosure, the FCC had failed to demonstrate that release of these documents was consistent with its policy to release such materials only in “rare cases” and when justified by significant public interest factors.

<sup>15</sup> *Decision 2003-525* at 4.

<sup>16</sup> *Id.* at 6.

<sup>17</sup> Letter from Randy Herschaft to Shoko Hair (Aug. 13, 2003) (*FOIA 2003-526*).

<sup>18</sup> *Decision 2003-526* at 3.

<sup>19</sup> *Id.*

<sup>20</sup> Letters from Randy Herschaft to Office of General Counsel, Federal Communications Commission (Nov. 5, 2003) (*FOIA 2003-524 AFR*, *FOIA 2003-525 AFR*, and *FOIA 2004-526 AFR* respectively, or collectively *AFRs*).

<sup>21</sup> See, e.g., *FOIA 2003-524* at 2.

<sup>22</sup> See, e.g., *id.* at 1-2.

in the information provided by the RBOCs. Herschaft seeks release of “all disclosable non-exempt portions [of the records sought] that are reasonably segregable.”<sup>23</sup>

7. Verizon, BellSouth, SBC, and Qwest filed oppositions to the Applications for Review. Verizon points out that the Commission has made available to the public a significant amount of information about the CPR audits, including the audit staff’s preliminary findings, the staff report, and the responses of the audited companies.<sup>24</sup> In addition, Verizon asserts that it made available certain highly confidential documents, subject to a protective order.<sup>25</sup> Verizon further states that the United States Court of Appeals for the District of Columbia Circuit determined in *Qwest Communications*<sup>26</sup> that CPR audit data may not be released to the public pursuant to a FOIA request.<sup>27</sup> BellSouth argues that Herschaft’s application for review presents no new facts or arguments from the initial FOIA requests and that the public interest arguments raised are identical to those considered and rejected by the Bureau.<sup>28</sup> BellSouth maintains that none of the specific factors necessary to grant an application for review, as set forth in the Commission’s rules, have been demonstrated in the *AFRs*.<sup>29</sup> In particular, BellSouth argues that the Commission is compelled by statute to protect the confidentiality of audit data and may release such data only in rare cases.<sup>30</sup> SBC urges the Commission to follow its longstanding policy of protecting the confidentiality of materials submitted by carriers in the course of its audits under FOIA Exemption 4 and protecting audit reports and other internal agency documents regarding audits as exempt from disclosure under Exemption 5.<sup>31</sup> SBC asserts that the Exemption 4 material should not be released under *National Parks*.<sup>32</sup> SBC also asserts that at least some of the Exemption 4 material was voluntarily provided to the auditor and should not be disclosed for that reason.<sup>33</sup> Finally, Qwest maintains that Herschaft fails to meet the standards required for an application for review.<sup>34</sup> Qwest argues that disclosure of the withheld documents would “be detrimental to Qwest’s commercial relationships” and that the previous disclosure of the audit reports – as opposed to the raw audit data sought by Herschaft – by the Commission “strikes a proper balance between Qwest’s interest in its proprietary commercial data and the public interest.”<sup>35</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> Letter from Marie Breslin, Asst. Vice President, Federal Regulatory Advocacy, Verizon to Laurence Schecker, Office of General Counsel, FCC (Nov. 20, 2003) (Verizon Opposition) at 1.

<sup>25</sup> *Id.* at 2.

<sup>26</sup> *Qwest Communications Int’l, Inc. v. FCC*, 229 F.3d 1172 (D.C. Cir. 2000).

<sup>27</sup> *Id.*

<sup>28</sup> Letter from Stephen L. Earnest, Legal Department, BellSouth Corp., to Laurence Schecker (Nov. 20, 2003) (BellSouth Opposition).

<sup>29</sup> *Id.* at 2-4, citing 47 C.F.R. § 1.115(b)(2).

<sup>30</sup> BellSouth Opposition at 4-5, citing *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd. 24816 (1998) (*Confidential Information Policy*), *recon. denied*, 14 FCC Rcd. 20128 (1999).

<sup>31</sup> Letter from Jim Lamoureux, Senior Counsel, SBC Telecommunications, Inc. to Laurence Schecker (Nov. 20, 2003) (SBC Opposition) at 2-3.

<sup>32</sup> *See id.* at 4, citing *National Parks*, 498 F.2d at 770.

<sup>33</sup> *See id.* at 4, citing *Critical Mass*, 975 F.2d at 879.

<sup>34</sup> Letter from Daphne E. Butler, Senior Attorney, Qwest, to Laurence Schecker (Nov. 20, 2003) (Qwest Opposition) at 2.

<sup>35</sup> *Id.* at 4.

Qwest claims that Herschaft has failed to present any public interest arguments that warrant a departure from the Commission's longstanding policy of treating the requested records as confidential and not subject to disclosure pursuant both to FOIA Exemption 4 and 5.<sup>36</sup>

## II. DISCUSSION

8. We affirm the Bureau's decisions in *Decisions 2003-524, 525 and 526* to withhold the Commission's internal deliberative process records pursuant to FOIA Exemption 5 and the carriers' confidential commercial and financial information pursuant to FOIA Exemption 4. We find that Herschaft has failed to demonstrate that reconsideration of the Bureau's action is warranted and we therefore deny the *AFRs*.<sup>37</sup>

### A. Internal Commission Records

9. The Bureau correctly withheld the internal Commission records documents pursuant to FOIA Exemption 5. FOIA Exemption 5 permits us to withhold "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency."<sup>38</sup> Normally, such papers are privileged and not available to private parties through the discovery process and by extension not through FOIA because "their disclosure would tend to restrain the commitment of ideas to writing, would tend to inhibit communication among Government personnel, and would, in some cases, involve premature disclosure of their contents."<sup>39</sup>

10. As explained in each of the Bureau's FOIA Decisions, the courts have interpreted Exemption 5 as incorporating certain common law privileges developed in civil discovery cases including, *inter alia*, the deliberative process privilege.<sup>40</sup> Exemption 5 thus exempts from disclosure predecisional materials that reflect the consultative and decision-making process through which agency policies are developed.<sup>41</sup> Recommendations and opinions of agency personnel expressed prior to adoption of agency policy, including draft decisions and reports, are exempt from disclosure under Exemption 5.<sup>42</sup>

11. Although Herschaft never directly challenges the sufficiency of the Bureau's Exemption 5 findings, he implies in the *AFRs* that the Bureau failed to demonstrate that the documents requested satisfy the requirements of the deliberative process privilege.<sup>43</sup> Herschaft also argues that release of the requested documents is in the public interest.

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<sup>36</sup> *Id.* at 2-3.

<sup>37</sup> See 47 C.F.R. § 1.115(b)(2)(i-v).

<sup>38</sup> 5 U.S.C. § 552(b)(5); see also 47 C.F.R. § 0.457(e)(Commission implementing regulation).

<sup>39</sup> See 47 C.F.R. § 0.457(e).

<sup>40</sup> See *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 862 (D.C.Cir. 1980) (*Coastal States*); *Jordan v. Dept. of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978) (*Jordan*). See also *Tax Analysts v. Internal Revenue Service*, 294 F.3d 71, 76 (D.C. Cir. 2002) (Exemption 5 incorporates deliberative process privilege)

<sup>41</sup> *Coastal States*, 617 F.2d at 866; see also *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975) (predecisional materials must be part of give-and-take by which a decision is made)

<sup>42</sup> See *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 152-53, n. 18 (1975) (*Sears, Roebuck*); *Access Reports v. Department of Justice*, 926 F.2d 1192, 1194-95 (D.C. Cir. 1979).

<sup>43</sup> See, e.g., *FOIA 2003-524 AFR* at 3.

12. To invoke the deliberative process privilege, the Commission must establish two prerequisites: the materials requested must be: (1) predecisional; and (2) deliberative.<sup>44</sup> Documents are considered to be predecisional if they are “antecedent to the adoption of agency policy.”<sup>45</sup> We find, as did the Bureau,<sup>46</sup> that the documents responsive to each of Herschaft’s FOIA requests predate the Commission’s issuance of the final CPR audit reports in 1999. The documents do not contain final policy decisions of the agency but rather are part of the deliberative process leading to a final decision. We therefore agree with the Bureau that all of the requested documents are predecisional.

13. We next address the question of whether the documents responsive to each of Herschaft’s FOIA requests are deliberative. Courts have found that the critical factor in determining whether material requested pursuant to the FOIA is deliberative in nature “is whether disclosure of the information would ‘discourage candid discussion within the agency’”<sup>47</sup> and whether the document reflects “the give-and-take of the consultative process.”<sup>48</sup> The exemption thus “covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.”<sup>49</sup> The decision that the privilege applies thus rests on the conclusion that, unless protected from disclosure, “information of that type would not flow freely within the agency.”<sup>50</sup>

14. In *Decision 2003-524*, the Bureau explained that the Commission staff’s internal briefing materials prepared in anticipation of congressional briefings on the CPR audits contain the “preliminary and advisory views of Commission personnel involved in the CPR audits to the Commissioners regarding the audits and the options the Commissioners might elect as a result of the audits.”<sup>51</sup> The Bureau properly concluded that disclosure of such internal materials “could discourage the free analysis of future audits because staff members may fear that their individual questions, judgments, conclusions, and advice will be subjected to public scrutiny,” thus jeopardizing the Commission’s ability to develop policies and reach decisions through a deliberative process.<sup>52</sup> Moreover, it is well established that briefing materials relating to congressional testimony satisfy the requirements of the deliberative process privilege and are protected under Exemption 5.<sup>53</sup> Those testifying before Congress are “entitled to have a full and frank discussion” with staff concerning “issues, priorities, and policy matters” that will be the subject of the testimony.<sup>54</sup>

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<sup>44</sup> *Petroleum Info. Corp. v. Dep’t of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992).

<sup>45</sup> *Jordan*, 591 F.2d at 774.

<sup>46</sup> See *Decision 2003-525* at 4; *Decision 2003-524* at 2; *Decision 2003-526* at 3.

<sup>47</sup> *Access Reports*, 926 F.2d at 1195 (quoting *Dudman Communications Corp. v. Dep’t of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987) (*Dudman*)).

<sup>48</sup> *Coastal States*, 617 F.2d at 866.

<sup>49</sup> *Id.*

<sup>50</sup> *Mead Data Cent v. Dep’t of the Air Force*, 566 F. 2d 242, 256 (D.C. Cir. 1977).

<sup>51</sup> *Decision 2003-524* at 3.

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., *Judicial Watch, Inc. v. Dep’t of Justice*, 306 F. Supp. 2d 58, 71-72 (D.D.C. 2004) (protecting e-mail briefing for the FERC Chairman in anticipation of congressional testimony); see also *Williams v. Dep’t of Justice*, 556 F. Supp. 63, 65 (D.D.C. 1982) (protecting briefing papers for Attorney General prior to appearance before congressional committee); see also *Access Report*, 926 F.2d at 1196-97 (protecting memorandum on legislative strategy).

<sup>54</sup> *Judicial Watch*, 306 F. Supp. 2d at 72.

The sharing of any portion of the materials with congressional staff during a briefing does not waive Exemption 5 protection.<sup>55</sup> We therefore uphold the Bureau's decision to withhold Exemption 5 materials requested by FOIA 2003-524.

15. The Bureau ruled in *Decision 2003-525* that the requested documents – workpapers generated by Commission staff in the course of the CPR audits – were exempt from disclosure under Exemption 5 of the FOIA (as well as Exemption 4, discussed below) and that disclosure was not in the public interest. The Bureau interpreted the request to include “documents relating to the Commission auditors’ assessment of information submitted by the carriers in the course of the audits,” including material generated by staff,<sup>56</sup> and found that such documents, whether or not they contained carriers’ confidential commercial or financial information, were exempt from disclosure pursuant to Exemption 5.

16. We again affirm the Bureau's conclusion. The workpapers represent the staff's internal recommendations and opinions integral to the deliberative process.<sup>57</sup> The Commission's longstanding policy has been to treat audit materials prepared pursuant to section 220 of the Act as deliberative process documents that, consistent with Exemption 5, generally should not be disclosed to the extent they present staff findings and recommendations to assist the Commission in pre-decisional deliberations.<sup>58</sup> For these reasons, we find that the Bureau appropriately withheld the work paper materials generated by staff, e.g., staff notes, proposed decisions and memoranda, under Exemption 5.

17. Finally, in *Decision 2003-526*, the Bureau denied Herschaft's request for internal correspondence between Commissioners or their aides and the auditors conducting the CPR audits and between the management of the Common Carrier Bureau and the Accounting Safeguards Division management relating to the CPR audits pursuant to FOIA Exemption 5. The requested documents reflect the give-and-take of the consultative process within an agency and are the kind of intra-agency communications that Exemption 5 is intended to protect from disclosure.<sup>59</sup> Commissioners and Bureau management routinely seek information from staff as they weigh their policy options before a final agency decision is made. If such exchanges are disclosed to the public, the quality of decision-making would be undermined, and the free flow of information within the agency would be stifled.

18. Herschaft argues in each *AFR* that “overriding public interest concerns” warrant release of the requested documents and overcome the protection provided by FOIA Exemption 5.<sup>60</sup> With respect

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<sup>55</sup> When an agency shares information with Congress without disclosing the information to the public, the courts have consistently ruled that the exchange of information does not result in waiver of FOIA exemptions. The FOIA statute provides that “[t]his section is not authority to withhold information from Congress.” 5 U.S.C. § 552(d). In *Murphy v. Dep't of the Army*, 613 F.2d 1151, 1155-56 (D.C. Cir. 1979), the court observed that if “disclosure of information to Congress [were] disclosure to the whole world,” it would be “inconsistent with the obvious purpose of the Congress to carve out for itself a special right of access to privileged information not shared by others.” Failure to protect information disclosed to Congress “would effectively transform [this] section . . . into a congressional declassification scheme.” *Id.* See also *Rockwell v. Dep't of Justice*, 235 F.3d 598, 604-05 (D.C. Cir. 2001) (finding no waiver of Exemption 5 protection for documents provided to a congressional oversight subcommittee).

<sup>56</sup> *Decision 2003-525* at 4.

<sup>57</sup> See *Coastal States*, 617 F.2d at 866 (Exemption 5 protects consultative process).

<sup>58</sup> See *Confidential Information Policy*, 13 FCC Rcd at 24847-49.

<sup>59</sup> See, e.g., *Access Reports*, 926 F.2d at 1194 (“a document is deliberative if it ‘reflects the give-and-take of the consultative process’”), quoting *Coastal States*, 617 F.2d at 866.

<sup>60</sup> See, e.g., *FOIA 2003-254 AFR* at 1.

to all of the audits, Herschaft argues disclosure is warranted to determine whether the auditors were hasty or arbitrary in their determinations.<sup>61</sup> In the *2003-525 AFR* concerning the audit work papers, Herschaft also argues that disclosure is warranted because the CPR audit reports released by the Commission did not provide sufficient information to determine the accuracy of the RBOCs' claims that the design of the audits was flawed.<sup>62</sup> Herschaft maintains that, because the CPR audits were conducted with public funds, the public has a right to examine "the fruit of all that labor."<sup>63</sup> Further, Herschaft argues that questions remain as to whether consumers' phone bills have been increased as a result of failure to correct the unjustified costs identified in the audits.<sup>64</sup> The fact that public funds were used to conduct the audits does not distinguish them from any other situation in which the deliberative process privilege applies. Nor does the possibility of errors in the audits distinguish them from any other agency actions. As the Bureau pointed out, the Commission posted the audit reports on its website.<sup>65</sup> To the extent Herschaft argues that the publicly released reports do not satisfy the objectives Herschaft sets forth, we find that Herschaft has not offered sufficient public interest arguments that warrant the disruption of and damage to the agency's deliberative process that would result from the release of these predecisional internal documents.

19. Herschaft also seeks release of those portions of the requested documents that are not protected by the deliberative process and are segregable from the protected portions.<sup>66</sup> Herschaft points out that FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."<sup>67</sup> After a review of the documents requested pursuant to each of Herschaft's FOIA requests, the Bureau concluded that there are no reasonably segregable portions that may be released. Because Exemption 5 is concerned not merely with the substantive content of government records, but with the integrity of the government's deliberative process itself, factual information may be withheld when disclosure would threaten an agency's ability to conduct its decision-making processes.<sup>68</sup> Therefore, factual materials that would expose the subjective judgment of agency personnel or the manner in which an internal deliberative process is conducted is protected under Exemption 5.<sup>69</sup>

20. We uphold the Bureau's determination that the Exemption 5 materials do not contain reasonably segregable factual portions. In the case of the congressional briefing materials requested pursuant to *FOIA 2003-524*, the documents represent the internal deliberations of Commission staff and, to the extent that factual material is included, it reflects the subjective judgment of staff as to what facts are important and how the facts fit together. The factual material thus is inextricably linked with the deliberative process materials. In addition, as explained in the Bureau's ruling and discussed below, four of the pages withheld under Exemption 5 also contain confidential financial information that is also

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<sup>61</sup> See, e.g., *FOIA 2003-525 AFR* at 2.

<sup>62</sup> *FOIA 2003-525 AFR* at 2.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2.

<sup>65</sup> See *FCC Releases Audit Report on RBOC's Property Record*, News Release, Report No. CC 99-3 (rel. Feb. 25, 1999).

<sup>66</sup> See, e.g., *2003-254 AFR* at 3.

<sup>67</sup> See *id.* citing 5 U.S.C. § 552(b).

<sup>68</sup> E.g., *Sears, Roebuck*, 421 U.S. at 150.

<sup>69</sup> *Wolfe v. Dept. of Health and Human Services*, 839 F.2d 768, 774-76 (D.C. Cir. 1988)(*en banc*) (*Wolfe*); *Dudman*, 815 F.2d at 1568.



exempt from disclosure under Exemption 4 of the FOIA.<sup>70</sup> The documents located in connection with *FOIA 2003-525* are audit-related materials. The portions representing the submissions by carriers are exempt from disclosure pursuant to Exemption 4; the other materials represent the internal work papers of the Commission's auditors. We agree with the Bureau's assessment that no portion of the internal staff work papers may be disclosed without revealing the deliberative process of the auditors as to the significance of the included factual materials. Any factual material included in the workpapers would expose the pre-decisional subjective judgments of agency personnel or the conduct of the internal deliberative process and is protected under Exemption 5.<sup>71</sup> Finally, all of the internal e-mail correspondence that was the subject of *FOIA 2003-526*, as explained fully above, represents the deliberations of the agency's decision makers and therefore cannot be disclosed without revealing the process by which the Commissioners considered options as they formulated their audit policy. To the extent that the requested internal correspondence includes factual material, the factual information is so inextricably connected to the deliberative material that its disclosure would expose the agency's deliberations. If revealing factual information is tantamount to revealing the agency's deliberations, courts have permitted the facts to be withheld.<sup>72</sup>

## **B. Confidential Commercial Records**

21. Under FOIA Exemption 4, agencies may withhold documents obtained from a person that contain trade secrets and commercial and financial information that are privileged or confidential.<sup>73</sup> The exemption affords protection to submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure. As the Bureau explained, the D.C. Circuit has set forth a two-part test for determining whether commercial or financial information contained in required submissions is "confidential" under Exemption 4.<sup>74</sup> Such information is confidential "if disclosure of the information is likely ...either...(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."<sup>75</sup>

22. The RBOCs maintained that disclosure of the information sought by Herschaft in FOIA 2003-525 would impose substantial competitive harm because, for example, it would disclose types of equipment purchased by the RBOCs, the equipment vendors, and the prices paid for the equipment.<sup>76</sup> This information constitutes the kind of commercially sensitive data protected by FOIA Exemption 4.<sup>77</sup>

23. Section 220 of the Communications Act, as amended, 47 U.S.C. § 220, provides additional protections for information submitted to the Commission in connection with audits.

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<sup>70</sup> See discussion of the documents withheld pursuant to FOIA Exemption 4 at Section II.B, *infra*.

<sup>71</sup> See *Wolfe*, 839 F.2d at 774-75; *Russell v. Dept. of the Air Force*, 682 F.2d 1045, 1047-48 (D.C. Cir. 1982).

<sup>72</sup> See, e.g., *Quarles v. Dep't of Navy*, 893 F.2d 390, 392-93 (D.C. Cir. 1990) (deliberative process privilege covers construction cost estimates because their disclosure would reveal the agency's deliberations).

<sup>73</sup> 5 U.S.C. § 552(b)(4).

<sup>74</sup> *National Parks*, 498 F.2d at 770.

<sup>75</sup> *Id.*

<sup>76</sup> Qwest Opposition at 4.

<sup>77</sup> See, e.g., *Gulf & Western Indus., Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979); *Southwestern Bell Telephone Co.*, 12 FCC Rcd 7770, 7771 (1997) (substantial competitive harm from release of equipment cost information); SBC Opposition at 5.

Specifically, section 220(f) prohibits any employee of the Commission from disclosing “any fact or information which may come to his knowledge during the course of examination of books or other accounts...except insofar as he may be directed by the Commission or by a court.”<sup>78</sup> The Commission has a longstanding policy of treating information obtained from carriers during audits as confidential in recognition of carriers’ legitimate interest in protecting such information from disclosure to competitors. The Commission has stated that it may publicly disclose audit information “in rare cases” and only “where the underlying concerns that normally lead us to withhold audit information from public disclosure are diminished by the minimal risk posed by the release of aggregate data or, where the data is otherwise not highly commercially sensitive and disclosure is justified by significant public interest factors.”<sup>79</sup> Further, as the Bureau noted in its ruling, the United States Court of Appeals for the District of Columbia Circuit previously reviewed the Commission’s decision to release data collected by the CPR audits pursuant to a protective order.<sup>80</sup> The Court overturned the FCC’s decision to release material holding that, while the FCC may release audit material in “rare cases,” the FCC had failed to adequately justify even the limited release of the audit data under a protective order.<sup>81</sup> Unconditional disclosure to the public through the FOIA process would require even greater justification than release to parties who sign a protective order.

24. Our policy against disclosure of raw audit data is based on our recognition that carriers have a legitimate interest in protecting confidential information and that disclosure “could result in competitive injury to those who provide such information to the Commission.”<sup>82</sup> In light of the D.C. Circuit’s decision in *Qwest Communications*, and our own longstanding policy concerning confidential information submitted to the agency, we will disclose such information only in “rare cases.” Herschaft states in his AFR that the public interest requires disclosure of the raw audit data requested because public funds were used to conduct the audits. Herschaft also states that questions raised in the press concerning the relationship of rising telephone bills and the errors uncovered by the audits justify disclosure of the information. Herschaft raised these same public interest arguments in the initial FOIA request, and the Bureau concluded that they did not constitute a persuasive showing warranting disclosure. The fact that public money was spent on an audit does not distinguish the CPR audits from most other matters in which the Commission receives information under a claim of confidentiality. Nor would press reports asserting possible errors in the audits justify the public release of confidential commercial and financial data. It would undermine Exemption 4 and section 220 to release confidential commercial and financial information merely because the press raises sometimes speculative criticisms about the information relied upon by the Commission in its decisions or quotes parties that may find it in their self-interest to criticize certain Commission decisions. Further, releasing confidential commercial or financial information in those circumstances would make it impossible for a regulatee to predict when the Commission would protect the confidentiality of such information. We find no basis to depart from our longstanding policy against disclosure of confidential information that is protected under Exemption 4 and we therefore deny Herschaft’s requests.

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<sup>78</sup> 47 U.S.C. § 220(f).

<sup>79</sup> *Confidential Information Policy*, 13 FCC Rcd at 24848-49.

<sup>80</sup> *Qwest Communications*, 229 F.3d at 1175.

<sup>81</sup> *Id.*

<sup>82</sup> *Confidential Information Policy*, 13 FCC Rcd at 24848.

**III. ORDERING PARAGRAPHS**

25. Accordingly, IT IS ORDERED that Randy R. Herschaft's applications for review of FOIA 2003-524, 2003-525, and 2003-526 ARE DENIED. Herschaft may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(b).

26. The officials responsible for this action are the following commissioners: Chairman Martin, Commissioners Copps, Adelstein, Tate and McDowell.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary